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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.M.S.R., *et al.*, Plaintiffs, v. Donald J. Trump, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No. 1:18-cv-02838

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

This Court should deny Plaintiffs' request to enjoin a critical regulation designed to address an urgent situation at the southern border, where the United States faces an accelerating surge of aliens who enter illegally and, if apprehended, seek asylum and remain in the country while that claim is adjudicated—even though their claims are frequently meritless and place an extraordinary burden on the immigration system.

The President, relying on his "broad discretion to suspend the entry of aliens into the United States" through proclamation, *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018), determined that entry must be temporarily suspended for the large number of aliens transiting Mexico who, rather than properly presenting themselves at a port of entry, violate our criminal and immigration laws and endanger themselves, any children accompanying them, and U.S. law enforcement officers by entering the country illegally along the southern border. The number of such single-adult individuals has doubled in the past year, and the number of family units has increased four-fold. The President sought to address this dangerous and illegal practice and regain control of the southern border by issuing a proclamation. The Attorney General and Secretary of Homeland Security, exercising their broad and express statutory authority, determined by regulation that those who enter the country in contravention of such a Presidential proclamation will not be eligible for the discretionary benefit of asylum. Such aliens can still establish eligibility for withholding of removal or protection under the regulations implementing the Convention Against Torture, so they will not be sent back to countries where they are more likely than not to face persecution or torture. The rule and proclamation together discourage illegal entry by those who might evade detection and if caught misuse the asylum process to gain release into the United States, channel aliens to ports of entry so that asylum claims may be processed in an orderly way, encourage aliens to apply for asylum in other countries they enter before reaching the United States, and facilitate negotiations with Mexico and other countries to prevent unlawful mass migration to the United States.

Plaintiffs are two aliens and two organizations who demand immediate relief halting these policies. This Court should deny Plaintiffs' extraordinary request.

To start, Plaintiffs' claims are not justiciable. Plaintiffs' claims of subject-matter jurisdiction contravene the channels prescribed by Congress. Both individual Plaintiffs have been issued notices to appear for removal proceedings under 8 U.S.C. § 1229a, and Congress has required them to raise any legal challenges to their eligibility for asylum in those proceedings—not in district court. *See* 8 U.S.C. § 1252(a)(5), (b)(9). Even if this Court had jurisdiction over those aliens' claims, Plaintiffs would still lack Article III standing because the rule has not been applied to them and thus has not caused any of them an injury in fact. The organizational Plaintiffs also lack standing. They are advocacy groups who claim injury based on the need to adapt to a new policy and speculation about its effect on their funding. That boundless view of injury would confer standing whenever the law changed, converting the Judiciary from a Branch that decides cases and controversies to an oversight board reviewing any shift in the law. Further, the organizational Plaintiffs' predictions about how their funding streams might change are far too speculative to support standing. Even if those Plaintiffs could demonstrate Article III standing, their asserted injuries fall well outside the zone of interests of our nation's immigration laws.

Plaintiffs' claims all also fail on the merits. Plaintiffs contend that the new asylum-ineligibility rule and proclamation conflict with 8 U.S.C. § 1158(a)(1), which states that an "alien who is physically present in the United States or who arrives in the United States . . . , irrespective of such alien's status, may apply for asylum." But though § 1158 allows unlawful entrants *to apply* for asylum, 8 U.S.C. § 1158(a)(1), it also confers broad discretion on the Attorney General and Secretary as to whether *to grant* asylum, *id.* § 1158(b)(1)(A), including broad authority to adopt categorical "limitations and conditions" on asylum eligibility by "regulation." *id.* § 1158(b)(2)(C). Indeed, Plaintiffs agree that the Executive Branch may create rules imposing such limitations and conditions. TRO Br. 16. Given that, there is no basis for arguing, as Plaintiffs do, that the rule cannot categorically render aliens ineligible for asylum based on a type of unlawful entry that is determined to warrant special attention and concern—entry at a particular place (the southern border) during a particular time (the duration of an applicable Presidential proclamation) aimed at addressing a particular urgent crisis at the border (dangerous unlawful entries by aliens with no

valid claim for asylum who nonetheless threaten to overwhelm the asylum system) and aiding international negotiations (aimed at stemming that crisis long term).

Equally meritless is Plaintiffs' argument that the rule conflicts with the Trafficking Victims Protection Reauthorization Act's (TVPRA) provisions governing unaccompanied alien children, 8 U.S.C. § 1232(a)(5)(D). The proclamation makes clear that it does not alter TVPRA procedures. Plaintiffs also suggest that the President usurped the Attorney General's discretionary authority over asylum under § 1158 for aliens present in the United States by issuing a proclamation suspending entry under 8 U.S.C. § 1182(f). This too is wrong. Section 1182(f) concerns restrictions on entry—a matter over which Plaintiffs do not dispute the President has broad authority; § 1158 concerns the separate issue of which aliens are eligible to apply for or receive asylum, which is a matter that the rule, rather than the proclamation, addresses.

The Court should also reject Plaintiffs' Administrative Procedure Act (APA) arbitrary and capricious and procedural challenges. The rule sensibly implements the policy goals of the President and the agencies by reinforcing and supporting a Presidential proclamation regarding entry, and reasonably addresses a growing crisis at the southern border whereby aliens cross the border in a dangerous and illegal manner and, if apprehended, claim asylum and remain in the country while the claim is adjudicated, with little prospect of actually being granted that discretionary relief. The rule explains the policy choice made and the methods used to achieve it, and that is all that is required.

The agencies also lawfully issued the rule as an interim final rule. The agencies had good cause to dispense with notice-and-comment rulemaking and a delayed effective date because notice-and-comment rulemaking would cause the very harms the rule is meant to prevent, and because the rule is part of ongoing diplomatic negotiations with Mexico and Northern Triangle countries aimed at resolving the crisis at the southern border. *See* 5 U.S.C. § 553(b)(B), (d)(3). For similar reasons, the foreign-affairs exception also applies. *See id.* § 553(a)(1).

Finally, Plaintiffs' request for a TRO or preliminary injunction must independently fall because they cannot establish that the balance of harms warrants drastic and immediate injunctive relief—particularly since no Plaintiff has been injured, let alone irreparably, by the rule, and where

the rule is already enjoined by another court. The Executive Branch, exercising its authority over the border and foreign affairs, determined that the rule is urgently needed to combat the migration crisis at the southern border, which needlessly endangers the lives of migrants, children, and federal officers. The rule does not prevent anyone from seeking asylum—they just must do so in an orderly manner at ports of entry—and it preserves mandatory protections from removal even for those who disregard the proclamation. The provisions of the rule challenged by Plaintiffs here also have already been enjoined on a nationwide basis by another district court, rendering superfluous any additional injunctive relief. In any event, the rule and proclamation aim to promote safety and save lives by discouraging aliens from making dangerous, unlawful border crossings.

LEGAL AND PROCEDURAL BACKGROUND

Legal Background. The President has broad constitutional power to exclude aliens. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). Congress has recognized the need for the President to regulate the flow of aliens into the United States, and has empowered the President to suspend or limit the entry of aliens when doing so is in the national interest and to impose regulations on the entry and departure of aliens. 8 U.S.C. §§ 1182(f), 1185(a).

Under 8 U.S.C. § 1158(a), "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, [8 U.S.C. § 1225(b)]." 8 U.S.C. § 1158(a)(1). Even under that general rule broadly allowing an alien to apply for asylum, § 1158(a) provides several limits: it generally bars an alien from even applying for asylum unless he files an application within a year after his arrival, *id.* § 1158(a)(2)(B); it requires that he has not "previously applied for asylum and had such application denied," *id.* § 1158(a)(2)(C); and it provides that he may be removed under a safe-third-country agreement (which requires aliens to apply for asylum in the first country they arrive in). *id.* § 1158(a)(2)(A). And although § 1158 provides a broad right to *apply* for asylum, a grant of asylum is discretionary and is subject to numerous eligibility bars. As § 1158(b) states, asylum "*may* [be] grant[ed] to an alien who has applied," *id*. § 1158(b)(1)(A), and even then it may be

granted only if the alien satisfies certain statutory standards, is not subject to an eligibility bar, and demonstrates that he or she merits a favorable exercise of discretion. *See id.* § 1158(b)(1)(B), (2). As part of the overarching executive discretion imbuing § 1158's asylum framework, "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C). The Attorney General has exercised his authority to exclude categories of aliens from being eligible to receive asylum. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55934, 55937-38 (Nov. 9, 2018) (citing examples). Besides the discretionary authority to grant asylum, the United States has a mandatory duty to provide two forms of protection from removal: withholding of removal (available when an alien establishes a probability of persecution if returned to a particular country) and protection under the Convention Against Torture (CAT) (available when an alien establishes a probability of torture if returned). *See id.* § 1231(b)(3)(A) (withholding); 8 C.F.R. §§ 208.16(b) 1208.16(b) (same); *id.* §§ 208.16(c), 1208.16(c) (CAT).

An alien abroad generally has no right to enter the United States. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). It is a crime for an alien to enter the United States without presenting himself for inspection at a port of entry. *See* 8 U.S.C. §§ 1325, 1326. Expedited removal procedures—streamlined procedures for promptly reviewing aliens' claims and removing certain aliens—may apply to certain aliens who arrive at a port of entry or who are apprehended shortly after illegally crossing the border without valid travel documents or who seek to procure admission through fraud or misrepresentation *Id.* § 1225(b); *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 4887748,877 (Aug. 11, 2004). Such aliens are referred for an interview in which they must demonstrate a "credible fear"—a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [§ 1158]." *Id.* § 1225(b)(1)(B). Regulations also provide for asylum officers to consider such a request under the standard for withholding or CAT protection. *See* 8 C.F.R. § 208.30(e)(3)-(4). If the asylum officer determines that the alien does not have a credible fear, and an immigration judge (IJ) agrees,

then the alien is removed from the United States without further review of the asylum claim. 8 U.S.C. § 1225(b)(1)(B)(iii)(I), (III), (b)(1)(C); *id*. § 1252(a)(2)(A)(iii), (e)(2). If the officer or the IJ determines that the alien has a credible fear, then the alien is placed in ordinary (full) removal proceedings under 8 U.S.C. § 1229a. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). Other procedures are used to screen applicants for withholding or CAT protection. This "reasonable fear" screening is similar to the credible-fear process, but with a standard suitable for withholding or CAT claims. *See* 83 Fed. Reg. at 55942; 8 C.F.R. § 208.31.

In full removal proceedings, an alien may raise various claims for relief or protection from removal, including asylum, withholding, and CAT protection. 8 U.S.C. §§ 1158(a)(1), 1231(b)(3)(A); 8 C.F.R. § 1208.16(b), (c); *see also* 8 U.S.C. § 1229a(c)(4). . If the alien is denied relief or protection on any ground, he may seek judicial review of that determination, after exhausting administrative remedies in the immigration courts and the Board of Immigration Appeals (BIA), in a federal court of appeals. *See* 8 U.S.C. § 1252(a)(5), (b)(9), (d). In those proceedings, the federal courts of appeal have exclusive jurisdiction to address any "constitutional claims or questions of law," *id.* § 1252(a)(2)(D), and any "questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States." *Id.* § 1252(b)(9).

Joint Rule/Presidential Proclamation. On November 9, 2018, the Attorney General and Secretary issued a joint interim final rule rendering ineligible for asylum aliens who enter the United States in contravention of a Presidential proclamation that, under 8 U.S.C. §§ 1182(f) and 1185(a), limits or suspends the entry of aliens into the United States through the southern border with Mexico. 83 Fed. Reg. 55934; 8 C.F.R. § 208.13(f). To impose that bar, the Attorney General and Secretary invoked their statutory authority to establish "additional limitations . . . under which an alien shall be ineligible for asylum" (8 U.S.C. § 1158(b)(2)(C)), and to impose "limitations on the consideration of an application for asylum." (*id.* § 1158(d)(5)(B)). *See* 83 Fed. Reg. at 55934-38. The rule explains that an "alien whose entry is suspended or limited by a proclamation is one whom the President has determined should not enter the United States" and that "[s]uch an alien would have engaged in actions that undermine a particularized determination in a proclamation

that the President judged as being required by the national interest." *Id.* at 55934. That decision reflects "sensitive determinations regarding foreign relations and national security that Congress has entrusted to the President," and "[a]liens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States." *Id.*

The rule also amends regulations (8 C.F.R. §§ 208.30(e)(5), 1208.30(e)(5)) to provide that an alien who contravenes such a Presidential proclamation may have an ineligibility bar applied to them during their credible-fear interview, since there is no significant possibility that the alien will be found to have a credible fear of persecution that could result in a grant of asylum when the alien is ineligible for asylum. *See* 83 Fed. Reg. at 55947. Aliens who are subject to the asylum eligibility bar may still be placed in removal proceedings before an IJ if they establish a reasonable fear of persecution or torture. *Id.* at 55952-53 (8 C.F.R. § 208.30(e)(5)). Consistent with the United States' international treaty obligations, that process considers claims for withholding of removal or CAT protection using the existing reasonable-fear standard, with review of a negative determination by an immigration judge, if appropriate. *Id.* at 55952-53.

The rule was issued as an interim final rule, effective immediately during the comment period under the good-cause and foreign-affairs exceptions to the notice-and-comment and effective-date requirements of the APA. *See id.* at 55949-50.

Later the same day that the rule was issued, the President issued a proclamation under 8 U.S.C. §§ 1182(f) and 1185(a) that "suspend[s] and limit[s]" "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico," except for aliens who properly present at a port of entry. *See* Proclamation No. 9822, *Addressing Mass Migration Through the Southern Border of the United States* § 1 (Proclamation) (Nov. 9, 2018), 83 Fed. Reg. 57661. The proclamation will last for 90 days after November 9 or until a safe-third-country agreement with Mexico takes effect, whichever is earlier. *Id.* §§ 2(a), (b). The proclamation does not limit any alien "from being considered" for withholding of removal or CAT protection, or alter protections grants minors under the TVPRA. *Id.* § 2(c).

Together, the proclamation and rule address the "continuing and threatened mass migration of aliens with no basis for admission into the United States through our southern border" and the need "to maintain the effectiveness of the asylum system for legitimate asylum seekers." *Id.* (preamble). The President observed that "approximately 2,000 inadmissible aliens have entered each day at our southern border" in recent weeks, and that a "substantial number of aliens primarily from Central America . . . are traveling in large, organized groups through Mexico and reportedly intend to enter the United States unlawfully or without proper documentation." *Id.* The proclamation explains that the "entry of large numbers of aliens into the United States unlawfully between ports of entry on the southern border is contrary to the national interest" and that such "[u]nlawful entry puts lives of both law enforcement and aliens at risk." *Id.*

The rule likewise identifies an "urgent situation at the southern border" where there "has been a significant increase in the number and percentage of aliens who seek admission or unlawfully enter . . . and then assert an intent to apply for asylum." 83 Fed. Reg. at 55944-45 (noting a 2000% increase in credible-fear referrals since FY2008, and that 61% of aliens from Northern Triangle countries assert a fear). The Departments explained that the rule is urgently needed to discourage aliens from crossing the border illegally, raising meritless asylum claims, and securing release into the country. In FY2018, 396,579 aliens were apprehended entering unlawfully between ports of entry along the southern border. *Id.* at 55948. That is more than 1,000 aliens every day—many with children—who are making a dangerous and illegal border crossing rather than presenting at a port of entry. And the rate of aliens making a credible-fear claim has gone up by 2000% since 2008, from "5,000 a year in [FY] 2008 to about 97,000 in FY 2018," while a large majority of these asylum claims are not meritorious. *Id.* at 55935, 55946 (of 34,158 case completions in FY2018 that began with a credible-fear claim, 71% resulted in a removal order, and asylum was granted in only 17%). Indeed, a substantial number of aliens "do not pursue their claims" once released into the United States, adding to significant backlogs in the immigration court system, or "fail to appear for . . . proceedings." *Id.* (26% of the 791,821 immigration case backlog due to this process, and 31% of case completions in FY2018 were due to alien not showing up to proceedings, and in many an asylum application was never filed). The

large majority of such claims ultimately lack merit. *Id.* at 55946. The statistics relating to nationals of Northern Triangle countries highlight this problem: of those establishing credible fear whose cases were resolved in FY2018, only 54% sought asylum, only 9% received asylum, and 38% did not appear in proceedings. *Id.* The rule thus explains that discretion to grant asylum will not be exercised for those who violate such a proclamation, to "channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner" and would not be able to either avoid detection or abuse the asylum process. *Id.* at 55935.

Finally, the rule explained that immediate action was warranted for the swift protection of the United States' southern border, immigration officers, and the hundreds of aliens who die each year crossing the border illegally, *see id.*, and to "encourage . . . aliens to first avail themselves of offers of asylum from Mexico." *Id.*

Other Litigation. On November 9, four organizations that provide legal and social services to immigrants and refugees filed suit challenging the rule and sought immediate injunctive relief. *See East Bay Sanctuary Covenant v. Trump*, No. 18-681, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018). Like Plaintiffs here, the *East Bay* plaintiffs alleged that the rule violates the APA because it exceeds the Executive Branch's statutory authority and was improperly promulgated without notice-and-comment rulemaking. On November 19, the district court granted a nationwide injunction barring implementation of the rule at least until a hearing on December 19, 2018. On December 1, the government filed a motion to stay the district court's injunction pending appeal with the Ninth Circuit. A divided panel denied that motion. *East Bay Sanctuary Covenant v. Trump*, No. 18-17274, — F.3d —, 2018 WL 6428204 (Dec. 7, 2018). The majority held that the rule likely violated the APA because the rule "is the equivalent of a bar to applying for asylum in contravention of a statute [(§ 1158)] that forbids the Attorney General from laying such a bar on these grounds" and because "it conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself." *Id.* at *15-16. Judge Leavy dissented, concluding that "there is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application," and "[n]othing in the structure or plain words of the statute . . . precludes a regulation categorically denying eligibility for asylum on the

basis of manner of entry." *Id.* (Dissent at 3). On December 11, the government asked the Supreme Court to stay the district court's injunction.

This Lawsuit. Plaintiffs filed this lawsuit on December 3, 2018. ECF No. 1. They allege that the rule and proclamation together improperly "create an unlawful mandatory bar on eligibility for asylum." Compl. ¶ 5. This case is the second of two substantially similar lawsuits filed in this District challenging the rule. The government has described and addressed the other lawsuit in its opposition to the preliminary-injunction request in that case. *See* ECF No. 22, *O.A. v. Trump*, No. 18-cv-2718 (D.D.C.).

The two individual Plaintiffs are aliens who crossed the border illegally and were apprehended shortly thereafter. Compl. ¶¶ 14, 19. They purport to represent a putative nationwide class of all aliens who have entered or will enter across the southern border between ports of entry after November 9, 2018. *Id.* ¶ 175. The two organizational Plaintiffs, CAIR and RAICES, are nonprofit legal services and advocacy organizations based in the District of Columbia and Texas, respectively. *Id.* ¶¶ 21-22.

Plaintiffs bring seven claims. First, they claim that the rule conflicts with the asylum statute and so is contrary to law under the APA. *Id.* ¶¶ 178-86. Second, they claim that the rule is arbitrary and capricious under the APA. *Id.* ¶¶ 187-94. Third, they claim the rule was improperly issued without notice and comment. *Id.* ¶¶ 195-201. Fourth, they claim the rule violates the procedural-due-process rights of individual Plaintiffs and class members. *Id.* ¶¶ 202-09. Fifth, they claim that the rule violates the TVPRA. *Id.* ¶¶ 210-17. Sixth, they claim a right to asylum procedures under the Mandamus Act. *Id.* ¶¶ 218-25. Seventh, they assert that the rule violates the Appointments Clause and 28 U.S.C. § 508(a). *Id.* ¶¶ 226-33.

On December 3, twelve days after the *East Bay* injunction was entered, Plaintiffs moved for a TRO or preliminary injunction enjoining Defendants from implementing the rule. *See* TRO Br. 19-45; Proposed Order 2. Plaintiffs argue that such relief is necessary because they are irreparably harmed by the denial of the opportunity to demonstrate that they are eligible for asylum. TRO Br. 40-42. As of this filing, the individual Plaintiffs have not been subject to the rule nor are they likely to soon be subject to it. Plaintiffs S.M.R.S. and R.S.P.S. were found to have credible

fear and were issues notices to appear for full removal proceedings, where they may raise their asylum challenges and can obtain judicial review of them. Exhibit A, Declaration of Elizabeth Scott. They have also been released from detention pending those proceedings. Compl. ¶ 129. CAIR and RAICES do not allege that either of them is currently serving a client to whom the rule has been applied, nor do they identify a prospective client to whom the rule has been or is about to be applied to. *See id.* ¶¶ 132-74.

STANDARD GOVERNING MOTION FOR PRELIMINARY INJUNCTION

A TRO or preliminary injunction is "an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). A party seeking such relief "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs must satisfy each requirement, and the D.C. Circuit has suggested that "a likelihood of success is an independent, freestanding requirement for a preliminary injunction" and that the Court may not apply the "sliding scale approach." *Nat'l Ass'n for Fixed Annuities v. Perez*, 219 F. Supp. 3d 10, 13 (D.D.C. 2016) (Moss, J.). Regardless of "whether the sliding scale approach applies," if Plaintiffs do not show "a substantial likelihood" of jurisdiction or demonstrate that they are "likely to suffer an irreparable injury, the Court must deny the motion." *Cal. Ass'n of Private Postsecondary Sch. v. DeVos*, No. 17-999, 2018 WL 5017749, at *4 (D.D.C. Oct. 16, 2018) (Moss, J.).

ARGUMENT

The Court should reject Plaintiffs' request for a TRO or preliminary injunction. Nothing here warrants emergency injunctive relief. The Court lacks jurisdiction over Plaintiffs' claims under 8 U.S.C. §§ 1252(e)(3) and 1331, and Plaintiffs fail to establish Article III standing. Even if the Court were to reach the merits, Plaintiffs' claims fail. Plaintiffs move for a TRO only on the basis of their § 1158, APA, and TVPRA claims, but those claims lack merit.[1] The rule is consistent

[1] Plaintiffs' failure to develop their other claims in their TRO briefing waives those claims for the purposes of the TRO. *See Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). And any procedural constitutional claim must fail because non-admitted aliens with no connections to the United States lack due process rights regarding their applications for admission. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Castro v. DHS*, 835 F.3d 422, 446 (3d Cir. 2016).

with § 1158(a) and § 1158(b)(2)(C)—it represents a reasonable application of the agency's authority to implement those sections—and the rule has no bearing on procedural protections for unaccompanied alien children under the TVPRA. It also reasonably implements an Executive Branch policy and is thus not arbitrary and capricious. And the rule was properly issued, without notice and comment, as an interim final rule under the good-cause and foreign-affairs exceptions. Finally, equitable factors support denying emergency relief, especially given Plaintiffs' lack of any irreparable injury.

I. Plaintiffs' Claims Are Not Justiciable.

Plaintiffs fail to carry their burden of establishing that this Court has subject-matter jurisdiction to hear their claims and that they have standing to raise them. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs invoke 28 U.S.C. § 1331 as a basis for jurisdiction, Compl. ¶ 8, but the INA forecloses jurisdiction under § 1331 for these claims. Plaintiffs also invoke 8 U.S.C. § 1252(e)(3) "[t]o the extent that Plaintiffs' claims constitute '[j]udicial review of determinations under [8 U.S.C. § 1225(b)]," Compl. ¶ 11, but no named Plaintiff has received a determination under § 1225(b), so § 1252(e)(3) cannot supply jurisdiction. And even if this Court had statutory jurisdiction, the individual Plaintiffs would lack standing to assert their claims, because the challenged rule has not been applied to them and they cannot show any possibility of imminent injury, and the organizational Plaintiffs' claims would not be justiciable, because they too lack standing and because they are not within the asylum statute's zone-of-interests.

A. The Court Lacks Subject-Matter Jurisdiction

1. The Court lacks jurisdiction under 28 U.S.C. § 1331

The INA precludes district-court jurisdiction over the individual Plaintiffs' claims. Those Plaintiffs were found to have a credible fear under existing procedures and were served notices to appear for full removal proceedings under 8 U.S.C. § 1229a. Ex. A. They are accordingly subject to statutory provisions that provide judicial review in federal courts of appeals—not district court.

The INA provides that "notwithstanding any other provision of law," its review provisions govern all removal-related claims. 8 U.S.C. § 1252(a)(5), (b)(9). Under § 1252(a)(5), "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for

judicial review of an order of removal." *Id.* § 1252(a)(5). And § 1252(b)(9) consolidates "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien" into "judicial review of a final order." *Id.* § 1252(b)(9). These provisions channel all issues arising from removal proceedings or that can be raised in those proceedings (conducted in the administrative immigration courts and the Board of Immigration Appeals) into a petition for review that must be filed with a federal court of appeals, and only after a removal order becomes final. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031, 1033-34 (9th Cir. 2016) ("Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process."); *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) (similar); *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 76 (D.D.C. 2018) (Boasberg, J.) (similar); *Ardestani v. INS*, 502 U.S. 129, 133 (1991) ("Congress intended the provisions of the Immigration and Nationality Act . . . to supplant the APA in immigration proceedings").

These provisions foreclose these Plaintiffs' efforts to sidestep administrative proceedings. Any asylum or protection-from-removal request they make must be raised in those proceedings. *J.E.F.M.*, 837 F.3d at 1031; 8 C.F.R. § 208.2(b) (once notice to appear is issued, asylum requests must be adjudicated in those proceedings). Because Plaintiffs must assert their asylum (and protection) claims in their removal proceedings, legal challenges concerning their ability to seek asylum are necessarily "inextricably intertwined" with their removal proceedings. *J.E.F.M.*, 837 F.3d at 1033; *see also Vetcher*, 316 F. Supp. 3d at 77. Plaintiffs' challenge would be especially inappropriate and premature, and contrary to Congress's calibrated review scheme, because Plaintiffs are asking this Court to review policies affecting their eligibility for asylum before an immigration court has even had a chance to evaluate Plaintiffs' requests for asylum, let alone to apply the challenged policies to Plaintiffs. *See J.E.F.M.*, 837 F.3d at 1033; *accord Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1518 (D.C. Cir. 1988) ("The 'harm' of being forced to invoke the asylum provisions before challenging their administration is in any event not a basis for us to ignore the constitutional limitations on our jurisdiction and . . . consider this claim

in the abstract."). Indeed, the question whether Plaintiffs should be granted asylum or protection from removal will likely be a central question in their removal proceedings, and the relief they seek in this Court may be granted in that process. *See Delgado v. Quarantillo*, 643 F.3d 52, 54 (2d Cir. 2011) (no jurisdiction over claims where relief requested effectively "render[s] the [removal] order" that may ultimately issue "invalid"). Resolving any future asylum claim by these Plaintiffs would require this Court to do what Congress has prohibited—resolve questions "arising from" their removal proceedings. 8 U.S.C. § 1252(b)(9). If Plaintiffs are denied asylum in removal proceedings (whether under the new bar to eligibility if the rule is able to operate, or because they are found to not otherwise be eligible under existing laws), they may then challenge that decision before the BIA. And any final removal order entered against a Plaintiff may then be challenged in the appropriate court of appeals, where Plaintiffs may raise constitutional or legal question arising from those proceedings. *See id.* § 1252(a)(2)(D). Plaintiffs cannot bypass the immigration courts and administrative process that they are required to exhaust before proceeding to federal court. *See J.E.F.M.*, 837 F.3d at 1033; *Aguilar*, 510 F.3d at 9; *Vetcher*, 316 F. Supp. 3d at 77.[2]

2. The Court lacks jurisdiction under 8 U.S.C. § 1252(e)(3)

Plaintiffs assert that jurisdiction is proper under § 1252(e)(3), the statute that permits limited review of changes to the expedited removal system. They are mistaken.

Section 1252(e)(3) gives this Court jurisdiction over challenges to written policies, procedure, or guidance "implement[ing]" the expedited removal system (8 U.S.C. § 1225(b)), but only when such a challenge is brought by a person who is subject to an expedited removal

[2] Although a merits issue, for similar reasons individual Plaintiffs may not invoke the APA because other "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Moreover, the APA provides for review only of "final agency action," *id.* § 704, but the President's proclamation is not "agency action" at all, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), and as to the rule, there has been no final decision denying asylum based on application of the rule to any Plaintiff, so each Plaintiff lacks final agency action as applied to them, given that removal proceedings are still pending. *See Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939); *Jama v. DHS*, 760 F.3d 490, 497 (6th Cir. 2014) ("once the agency has made a final decision on [plaintiff's] immigration status, i.e., at the conclusion of removal proceedings and following appeal to the BIA, then [he] may seek review").

"determination[] under section 1225(b)." *Id.* § 1252(e)(3)(A). Here, no Plaintiff, individual or organizational, is subject to such a "determination." S.M.S.R. and R.S.P.S. were issued notices to appear after being found to have credible fear under current regulatory process, and thus lack any expedited removal determination that can be challenged under § 1252(e)(3). *See Am. Immigration Lawyers Ass'n v. Reno (AILA)*, 199 F.3d 1352, 1360 (D.C. Cir. 2000). The Plaintiff organizations also may not bring suit under section 1252(e)(3). *Id*. (§ 1252(e)(3) allows suit "by, and only by, aliens against whom the [those] procedures had been applied").

B. Plaintiffs Lack Article III Standing

Plaintiffs' suit also fails on Article III grounds. To have standing, plaintiffs "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Plaintiffs do not have standing to challenge the rule or proclamation "apart from any concrete application that threatens imminent harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009). And when an organization seeks to sue on its own behalf, it must establish standing in the same manner as a private individual. *See People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015).

1. The individual Plaintiffs lack standing

First, neither individual Plaintiff can establish any imminent injury attributable to the rule or proclamation. The rule was enjoined by a different court and therefore has not been applied to them. Even without that injunction, both individual Plaintiffs are now in full immigration proceedings after having received *positive* credible-fear determinations, and so lack any injury at all as the rule has not been applied to them. Nothing prevents them from seeking asylum in those removal proceedings, and even were the injunction stayed, Plaintiffs could challenge the rule in the courts of appeal. It is therefore speculative whether the challenged rule and proclamation, even if enforced, would injure these Plaintiffs in any imminent way, let alone that such injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

2. The Organizational Plaintiffs lack Article III standing

The organizational Plaintiffs, CAIR and RAICES, seek to establish standing based on an alleged interference with their missions, under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See* TRO Br. 38-41. Organizations may have standing in some situations where their core activities are impaired, as recognized in *Havens*. But, notably, *Havens* arose under a private right of action under the Fair Housing Act, not the generalized challenges that Plaintiffs pursue here where Congress made plain its interest in channeling review to those directly impacted. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'"). Congress's aim to allow private enforcement of statutory prohibitions against discriminatory housing practices thus drove the Court's standing analysis. *See Havens*, 455 U.S. at 373-74. And even in the fair- housing context, an organization alleging standing under *Havens* must establish that it would have suffered some other injury if it had not diverted resources to counteracting the problem, because otherwise the diversion of resources is a purely self-inflicted injury. *See Fair Empl. Council of Greater Washington, Inc. v. BMC Marketing*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994). Here, however, the INA confers no "legally cognizable interests," *Spokeo*, 136 S. Ct. at 1549, on advocacy organizations, but it does the opposite by channeling review into removal proceedings, and no Plaintiff has alleged that it is being forced to divert resources to avoid other cognizable injuries.

Even assuming *Havens* applies, the D.C. Circuit has interpreted *Havens* to impose a two-part test for determining "whether an organization's injury is concrete and demonstrable or merely a setback to its abstract social interests." *PETA*, 797 F.3d at 1094. First, "we . . . ask[] whether the defendant's allegedly unlawful activities injured the plaintiff's interest in promoting its mission." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011). "If the answer is yes, we then ask whether the plaintiff used its resources to counteract that injury." *Id.* Here, neither CAIR nor RAICES satisfies these steps.

To satisfy the first element, the government's conduct must "directly conflict with the organization's mission." *Nat'l Treasury Emps. Union (NTEU) v. United States*, 101 F.3d 1423,

1430 (D.C. Cir. 1996). Standing exists only when "the action challenged . . . [is] at loggerheads with the stated mission of the plaintiff." *Id.* at 1429; *see also PETA*, 797 F.3d at 1095. CAIR and RAICES state their mission as "provid[ing] assistance to asylum seekers, including individuals who crossed the southern border outside approved ports of entry and who file applications for asylum with Defendant USCIS." Compl. ¶ 132. But nothing in the rule prevents CAIR or RAICES from continuing to represent asylum-seeking clients. Although the legal landscape may have partially changed because of the rule, those organizations can still provide legal services.

Even if there were an adequate conflict with those organizations' missions, they have failed to demonstrate that they meet the second requirement. Plaintiffs claim that they will suffer harm because, as a result of the rule, they will not be able to serve as many clients and that they will suffer corresponding financial harm. Compl. ¶ 136. But these concerns are speculative and self-inflicted. *Cf. Clapper*, 568 U.S. at 416 (no standing where plaintiffs' costly measures to avoid government surveillance they believed reasonably likely were "self-inflicted"). CAIR claims that it will not be able to fulfill its mission "to serve as many migrants lawfully seeking asylum as possible," and that it will "face a drastic reduction in its client base." Compl. ¶ 135. But Plaintiffs have provided no explanation why CAIR cannot continue to represent asylum seekers who have already crossed the border or who enter through a designated port of entry. Thus, Plaintiffs' claim that CAIR is likely to suffer financially—because, perhaps, it will have fewer clients and law firms will contribute less support, *id.* ¶¶ 151-52—is insufficient to confer standing. Similarly, RAICES alleges that it will not be able to serve as many clients as a result of the rule, without explaining why it cannot serve its clients. *See id.* ¶¶ 157-58. And Plaintiffs assert that the Government's decision to enforce the law by "deport[ing]" potential future clients "before they reach Washington D.C." will decrease their "client base." *Id.* ¶ 135. But Plaintiffs have no "judicially cognizable interest" in preventing the government from enforcing the law against third parties. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Moreover, Plaintiffs have no judicially cognizable basis to challenge a change in the law simply because it may affect future clients and then may in turn derivatively affect Plaintiff's own decisions about how to allocate their own resources. And that is especially so where Plaintiffs business model depends on future clients breaking the law in order

to avail themselves of Plaintiff's services. *See, e.g.*, *East Bay Sanctuary Covenant v. Trump,* No. 18-17274, 2018 WL 6428204, at *10 (9th Cir. Dec. 7, 2018); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006).

Plaintiffs also say that they must adapt to the new requirements by spending more time on their clients' cases, adjusting staffing, and analyzing the new policy and revising new training and orientation materials. Compl. ¶¶ 136-38, 147-48. But if such "injuries" could confer standing, then any legal services or advocacy organization could sue in federal court whenever there is a change in the law, simply by alleging that the organization must get up to speed on the impact of the change. Such impacts on legal representation do not satisfy Article III. Indeed, D.C. Circuit "precedent makes clear that an organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015); *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.").

Finally, Plaintiffs claim that CAIR and RAICES have been harmed because the lack of notice-and-comment procedures did not allow them to inform the government of the alleged harms that would result from the rule. Compl. ¶ 174. But "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers* , 555 U.S. 488, 496 (2009); *cf. Am. Ass'n for Homecare v. Leavitt*, No. 08-cv-0992, 2008 WL 2580217, at *5 (D.D.C. June 30, 2008) ("injury cannot stand on procedural violation alone without showing another actual injury"). And even were such an injury sufficient, it would supply Article III standing for only one claim.

3. **The organizational Plaintiffs fall outside the statutory zone of interests.**

The organizational Plaintiffs' claims are also outside the zone of interests of the statutes they invoke. The APA does not "allow suit by every person suffering injury in fact." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 395 (1987). The APA provides a cause of action only to one "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5

U.S.C. § 702. To be "aggrieved," "the interest sought to be protected" must "be arguably within the zone of interests to be protected or regulated by the statute . . . in question," *Clarke*, 479 U.S. at 396 (modifications omitted). Plaintiffs invoke no such interest here.

Nothing in the INA and its asylum provisions even arguably suggests that the statute protects the interests of "nonprofit organizations that provide assistance to asylum seekers." Compl. ¶ 132. The asylum provisions neither regulate the organizational Plaintiffs' conduct nor create any benefits for which these organizations themselves might be eligible. And courts have routinely concluded that immigration statutes are directed at aliens, not the organizations advocating for them. When confronted with a similar challenge brought by "organizations that provide legal help to immigrants," Justice O'Connor concluded that the Immigration Reform and Control Act "was clearly meant to protect the interests of undocumented aliens, not the interests of [such] organizations," and the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *INS v. Legalization Assistance Project of L.A. Cty.*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). The D.C. Circuit and other courts have thus held that immigrant advocacy organizations are outside the immigration statutes' zone of interests. *See, e.g.*, *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996).

That reasoning fully applies here. Neither CAIR nor RAICES is applying for asylum; they seek to help others do so. Nothing in "the relevant provisions [can] be fairly read to implicate [CAIR's or RAICES's] interest in the efficient use of resources." *Nw. Immigrant Rights Project v. USCIS*, 325 F.R.D. 671, 688 (W.D. Wash. 2016). Because CAIR and RAICES are simply bystanders to the statutory scheme, the (alleged) effects on their resources are outside the statutory zone of interests. *See Legalization Assistance Project*, 510 U.S. at 1305 ("The fact that the INS regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect.").[3]

[3] The INA itself confirms that such organizations are *not* within the zone of interests. An alien's challenge to an asylum determination must occur in individual removal proceedings, and others may not bring suit on their behalf. 8 U.S.C. § 1252(a); *see Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). And as to any allegedchange to expedited removal, § 1252(e)(3) creates the exclusive review scheme for such challenges and precludes organizational challenges. *See infra.*

The procedural nature of some of the organizational Plaintiffs' claims makes no difference. A plaintiff asserting a violation of the APA's notice-and-comment requirements must show that the underlying concrete Article III injury comes within the zone of interests protected by the underlying substantive statute upon which the claim is based—here, the INA. *See Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014). Plaintiffs have not done so.

II. The Rule and Proclamation Are Consistent with the INA and Other Federal Law

Plaintiffs argue that the rule and proclamation, by making certain aliens ineligible for asylum, conflict with the INA. TRO Br. 1-2, 10-35. Not so. The rule is consistent with the asylum statute, and the proclamation falls within the President's authority to regulate the entry of aliens. Further, the rule has no impact on procedural protections for unaccompanied alien children under the TVPRA, and so does not conflict with that statute either.

A. The Rule Is Consistent with 8 U.S.C. § 1158

Plaintiffs contend that the rule unlawfully renders aliens ineligible for asylum based on their manner of their entry. That argument fails for two independent reasons. First, the rule is a lawful exercise of the broad authority and discretion conferred on the Attorney General and the Secretary over granting asylum, including their express authority under 8 U.S.C. § 1158(b)(2)(C) to adopt categorical limitations on asylum eligibility. And second, the rule is not predicated upon an alien's unlawful entry per se, but upon the alien's entry in contravention of a Presidential proclamation of limited duration and scope, reflecting the President's efforts to address a crisis at the southern border and related foreign-policy judgments.

First, § 1158(b)(1) makes a grant of asylum a matter of the Executive's discretion, and § 1158(b)(2)(C) authorizes the agency heads to "establish *additional* limitations and conditions . . . under which an alien shall be ineligible for asylum" on top of the six statutory bars on asylum eligibility set forth in § 1158(b)(2)(A). 8 U.S.C § 1158(b)(2)(C) (emphasis added). Plaintiffs contend (TRO Br. 11-19) that the rule violates § 1158(a), which provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section." 8 U.S.C. § 1158(a)(1). But the instruction that aliens "may apply"

for asylum regardless of whether they entered at a port of entry does not require, as Plaintiffs suggest, that an alien must be eligible for or be able to "receive" asylum. TRO Br. 12. Rather, § 1158 carefully distinguishes between an alien's ability *to apply* for asylum and the Executive's authority *to deny* asylum on grounds of ineligibility, imposing different sets of requirements for each stage of the process. Section 1158(a) governs who may apply for asylum, includes several categorical bars to applying (*e.g.*, an alien present in the country for more than one year may not apply). Section 1158(b), in turn, governs who may be granted asylum. To start, § 1158(b)(1)(A) authorizes the Attorney General or the Secretary to "grant asylum to an alien who has applied" as an exercise of discretion. Section 1158(b)(2) specifies six categories of aliens to whom "[p]aragraph (1)" (*i.e.,* the discretionary authority to *grant* asylum to an applicant) "shall not apply." Any alien falling within one of those categories may apply for asylum under §1158(a)(1) but is categorically ineligible to receive it under §1158(b). The text and structure of the statute thus show that "Congress has decided that the right to apply for asylum does not assure any alien that something other than a categorical denial of asylum is inevitable. . . . [T]here is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application." *East Bay Sanctuary Covenant*, 2018 2018 WL 6428204, Dissent at 3 (Leavy, J., dissenting in part). The rule merely adds an additional bar that operates the same way, as Congress expressly authorized.

Plaintiffs acknowledge that the agencies have, for decades, considered whether an alien unlawfully entered the country in issuing discretionary asylum denials. TRO Br. 14. Plaintiffs' position thus reduces to the theory that while an alien could be denied asylum on a case-by-case discretionary basis due to his manner of entry or attempted entry, the government cannot categorically deny eligibility for asylum simply because an applicant entered between ports. *Id.* at 15 (citing *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987)). But that theory does not withstand scrutiny. First, *Pula* merely set forth parameters for deciding whether an alien otherwise eligible for asylum should receive it as a discretionary matter, and decided that such discretion should be exercised based on a multifactor totality-of-the-circumstances approach, not a per se rule treating the manner of entry as disqualifying. 19 I. & N. Dec. at 473. Indeed, the BIA

concluded that § 1158(a) did not bar the categorical exercise of discretion to deny an alien asylum based on his manner of entry, which was the rule in the years prior to *Pula*. *See Matter of Salim*, 18 I. & N. Dec. 311 315-16 (BIA 1982). Rather, the BIA in *Pula* just chose, as a policy matter, to weigh a broader set of factors when exercising discretion to grant or deny asylum claims.[4] *Pula* in no way held that a categorical bar rendering an alien ineligible for asylum based on his manner of entry would violate the INA, and indeed pre-dated the enactment of § 1158(b)(2)(C), which expressly authorized the Attorney General to establish additional eligibility bars "by regulation"—i.e., not on a case-by-case basis. The relevance of *Pula* is that the BIA has properly treated illegal entry as a discretionary factor to consider in the context of individualized asylum adjudications for many years. But nothing in § 1158 forbids the Executive from adopting a categorical eligibility bar—particularly given the public-safety and foreign-policy problems posed by this specific subset of illegal entrants. *See Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994) ("§ 1158(a) . . . does not preclude the Attorney General from exercising [his] discretion by promulgating reasonable regulations applicable to . . . undesirable classes of aliens."). In fact, under *Pula*, consideration of illegal entry will at least sometimes tip the scales against asylum—yet Plaintiffs can provide no explanation for how that result is "consistent" with § 1158(a) but the rule here is not. If § 1158(a) does not prohibit the agency from considering manner of entry on a case-by-case basis when determining whether to grant asylum under § 1158(b), there is no textual basis to conclude that it prohibits the agency from considering manner of entry categorically under the express authority

[4] As the Board has explained, "[a] careful reading of the language of [§ 1158(a)(1)] reveals that the phrase 'irrespective of such alien's status' modifies only the word 'alien' in the first clause of the sentence." *Matter of Pula*, 19 I. & N. Dec. at 473. "The function of that phrase is to ensure that the procedure established by the Attorney General for asylum applications includes provisions for adjudicating applications from *any* alien present in the United States or at a land or port of entry, 'irrespective of such alien's status.'" *Id.* (collecting cases). Thus, Congress made clear that aliens like stowaways, who, at the time the Refugee Act was passed, could not avail themselves of our immigration laws, would be eligible at least to apply for asylum "irrespective of [their] status." *See id.* "The phrase does not apply to the second clause of the sentence, which is independent and separate from the first clause," and "contains authorization for the Attorney General to grant asylum applications at his discretion." *Id.* "Thus, while [§ 1158](a) provides that an asylum application be accepted from an alien 'irrespective of such alien's status,' no language in that section precludes the consideration of the alien's status in granting or denying the application in the exercise of discretion." *Id.* at 467.

to create categorical bars. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001) (rejecting the argument that the Bureau of Prisons was required to make "case-by-case assessments" of eligibility for sentence reductions and explaining that an agency "is not required continually to revisit 'issues that may be established fairly and efficiently in a single rulemaking'"). The simple fact is that the ultimate "decision whether asylum should be granted to an eligible alien is committed to the Attorney General's [and the Secretary's] discretion," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999), and "[u]nder the INA, the term 'discretion' does not supplant [the] general grant of permission for rulemaking," and "'discretion' under § 1158(a) may be exercised by rules giving fixed weight to a particular factor." *Yang v. INS*, 79 F.3d 932, 936-37 (9th Cir. 1996); *Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (Friendly, J.) ("The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups."); *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1501 (D.C. Cir. 1988) (holding, in reliance on *Mak*, that agency need not "exercise its statutory discretion anew in each particular case"). Indeed, Congress, in enacting 8 U.S.C. § 1158(b)(2)(C), clearly contemplated that the Attorney General would adopt categorical limitations on asylum eligibility, by authorizing the imposition of such restrictions "*by regulation*" and not only case by case. (Emphasis added.)[5]; *see also Hawaii*, 138 S. Ct. at 2411 ("The INA certainly does not require that systemic problems such as the lack of reliable information be addressed only in a progression of case by case admissibility determinations").

Second, and in any event, the rule is not predicated upon the manner of an alien's entry per se, but upon whether an alien has contravened a Presidential proclamation concerning a particular crisis at the southern border at a particular time. Plaintiffs argue that this is a "spurious distinction" since, in their view, the rule denies asylum on the basis of status—that of having violated the immigration laws in a specific manner. TRO Br. 15-16. But the Proclamation does not affect all illegal entrants, nor does it forbid illegal entry nor duplicate any other prohibition in the INA. The rule will "not preclude an alien physically present in the United States from being granted asylum

[5] In *Pula*, the Board addressed the weight to be given to manner of entry on a case-by-case basis, in the absence of a regulation governing the subject, and prior to § 1158(b)(2)(C)'s existence.

if the alien arrives in the United States through any border other than the southern land border with Mexico or at any time other than during the pendency of a proclamation suspending or limiting entry." 83 Fed. Reg. at 55941. The only category of aliens who are ineligible are those who are "subject" to a proclamation concerning the southern border and "nonetheless enter[] the United States after [that] proclamation [went] into effect," and have thus necessarily "engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest." *Id.* at 55940. The President's proclamation is a response to a particular and "immediate" "crisis"; it is "tailor[ed] . . . to channel" particular aliens "to ports of entry" to ensure that any entry will occur in "an orderly and controlled manner"; and it is a "foreign affairs" measure to "facilitate ongoing negotiations with Mexico and other countries regarding appropriate cooperative arrangements to prevent unlawful mass migration to the United States through the southern border." Proclamation (preamble). Nothing in § 1158 bars the adoption of an asylum-ineligibility rule that turns on the contravention of such a proclamation. After all, "[a]liens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States." 83 Fed. Reg. at 55940. And aliens subject to the proclamation are differently situated than other illegal entrants: the President has instructed his Cabinet secretaries to "consult with the Government of Mexico" and "to address the approach of large groups of aliens traveling through Mexico with the intent of entering the United States unlawfully, including efforts to deter, dissuade, and return such aliens before they physically enter United States territory through the southern border." Proclamation § 3.

Plaintiffs also argue that § 1158(a)(1) must be construed not to permit the rule in light of international treaty obligations, citing Article 31 of 1951 United Nations Protocol Relating to the Status of Refugees, which states that signatories "shall not impose penalties [on refugees], on account of their illegal entry or presence." *See* TRO Br. 17-19. Plaintiffs are wrong. First, a penalty under Article 31(1) is prohibited only for those refugees "who [are] coming *directly from a territory where their life or freedom was threatened*," and the individual Plaintiffs, both natives

and citizens of Honduras whose putative claims are based on acts that occurred or are feared in Honduras, are *not* coming directly from such a territory. So as applied to Plaintiffs, the rule does not implicate Article 31(1) at all. *See*, *e.g.*, *United States v. Malenge*, 472 F. Supp. 2d 269, 273 (N.D.N.Y. 2007). In any event, the rule is consistent with that provision of the Protocol—which "does not have the force of law in American courts," *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009)—because the bar is predicated upon contravention of a Presidential proclamation, not illegal entry per se, and aliens subject to the bar may still seek withholding of removal and CAT protection, which are the treaty obligations that the United States has implemented in domestic law. *Cazun v. Att'y Gen.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017). The availability of asylum on the other hand is *not* required by any treaty obligation. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987). Regardless, the government does not penalize an alien by denying asylum as a matter of discretion or limiting aliens to withholding and CAT protection: neither measure "imprison[s] or fine[s] aliens" as "the sort of criminal 'penalty' forbidden" by Article 31(1). *Id.*; *see Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017) (similar). This is especially true where the regulation retains an alien's eligibility to seek both withholding of removal and protection under the CAT. *See*, *e.g.*, *Mejia*, 866 F.3d at 588; *Cazun*, 856 F.3d at 257.

B. The Proclamation is a Valid Use of 8 U.S.C. § 1182(f) Authority and the Rule is Consistent With 8 U.S.C. § 1158(b)(2)(C).

The proclamation is a valid exercise of the President's authority over restricting entry under 8 U.S.C. § 1182(f) and the rule is a valid exercise of the Secretary's and Attorney General's authority to impose limitations and conditions on asylum eligibility under 8 U.S.C. § 1158(b)(2)(C). Plaintiffs argue that the rule "give[s] the President [a] blank check" to bar future classes of aliens from asylum by issuing a proclamation suspending entry. TRO Br. 29; *see also id.* at 29-32. Plaintiffs concede that the agency heads have the authority under § 1158(b)(2)(C) to set conditions on asylum eligibility and cannot reasonably dispute that the rule was issued by the agency heads. Yet they argue, purportedly based on § 1158(b)(2)(C)'s "plain language," that the rule "abdicate[s] responsibility for establishing additional limitations and conditions on asylum . .

. without threat of full judicial review or the process of agency rulemaking." TRO Br. 29. Plaintiffs are mistaken.

To start, Plaintiffs' arguments rest on a mischaracterization of the proclamation. Plaintiffs assert that the "detailed statutory framework in the INA for the handling of claims" suggest that the President cannot issue a proclamation affecting a group that is not referenced in the pre-existing statutory framework. TRO Br. 31. They point to §§ 1158(b)(2)(A), (b)(2)(B)(ii), and 1225(b)(1)(B) as specifying the only grounds, means, and procedure for setting asylum policy and highlight that none involve the President. *Id.* These arguments mischaracterize what the proclamation does. The proclamation does not deny anyone asylum, but simply suspends entry for aliens between ports of entry at the southern border for a temporary period. *See* Proclamation §§ 1, 2. To be sure, the rule imposes an eligibility bar to asylum for those who violate the proclamation's entry suspension—but, as explained, the INA authorizes the agency heads to establish that bar, and it was both lawful and reasonable to impose such a bar on aliens who violate a Presidential proclamation. *See supra*. Section 1182(f) concerns restrictions on entry—a matter over which the President has broad authority—whereas § 1158(a) and (b) go to the separate issue of which aliens are eligible to apply for or receive asylum, which is a matter that the proclamation does not affect but the rule lawfully addresses. *See Hawaii*, 138 S. Ct. at 2411.

That suspension—which rests on the President's authority under § 1185(a)(1) and § 1182(f)—is lawful. *See* Proclamation § 2. The President may suspend or restrict the entry of any "aliens or of any class of aliens" if he determines such entry "would be detrimental to the interests of the United States," "for such period as he shall deem necessary," 8 U.S.C. § 1182(f), and adopt "reasonable rules, regulations, and orders" governing the "entry" or "depart[ure]" of aliens, "subject to such limitations and exceptions as [he] may prescribe," *id.* § 1185(a)(1). The President found it in the national interest to suspend entry of these aliens and provided a detailed explanation for that determination. Proclamation (preamble). This limitation on entry is consistent with the President's authority under § 1182(f) and § 1185(a)(1), which together permit the

President to block a class of aliens from entering, even if the entry of such aliens is already illegal. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993).

Plaintiffs contend that, because the rule contemplates future Presidential proclamations, the President would be provided the ability to govern asylum eligibility "by unilateral decree, rather than through the regulatory process as required by the statute." TRO Br. 32. This argument also misses the mark. The President's § 1182(f) authority applies solely to the discretion over entry into the United States, a core sovereign authority. Congress was aware of the authority provided to the President under § 1182(f) when it revised § 1158, and indeed the Supreme Court had affirmed use of the President's authority to interdict aliens in a manner that prevented them from seeking asylum. *See Sale*, 509 U.S. at 187. Congress could have, but did not, restrict either or both the President's and the Attorney General's or the Secretary's discretion—here, the President's authority regarding the entry of persons from outside the United States and the agency heads' authority over the eligibility for asylum of persons inside the United States.

Plaintiffs also argue that the rule is inconsistent with the Attorney General and Secretary's authority under 8 U.S.C. § 1158(b)(2)(C) to impose limitations and conditions on asylum eligibility because it "introduces a limitation on asylum eligibility that is dramatically different from the restrictions specified in the statute itself." TRO Brief 21. This argument also fails. First, § 1158(b)(2)(C) is *not* a residual clause, but a separate, specific grant of authority to the Attorney General and Secretary to impose limitations or conditions so long as they are consistent with section 1158. Therefore, the authorities Plaintiffs cite regarding residual clauses are inapplicable. *See, e.g., Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988). Second, and more importantly, the rule is consistent with the section, as described above, and Plaintiffs' argument does not show otherwise.

C. The Rule is Consistent With the TVPRA

Plaintiffs' claims based on the TVPRA, TRO Br. 24-25, lack merit for the simple reason that no Plaintiff is in fact an unaccompanied minor. Regardless, the rule has no impact on the statutory procedural protections afforded to unaccompanied children under the TVPRA, 8 U.S.C. §§ 1232, 1158(b)(3)(C). The TVPRA sets forth procedural protections for unaccompanied alien

children in removal proceedings, but does not alter the substantive standards regarding asylum standards or eligibility. *See id*. Here, the proclamation makes clear that "[n]othing in this proclamation shall . . . limit the statutory processes afforded to unaccompanied alien children upon entering the United States under section 279 of title 6, United States Code, and section 1232 of title 8, United States Code." Proclamation § 2(c). The rule, in turn, does not alter TVPRA procedures, and does mention the TVPRA. Now, just as before, an unaccompanied alien child is not subject to expedited removal proceedings, and an asylum officer has initial jurisdiction over a child's asylum claim. *See* 8 U.S.C. §§ 1158(b)(3)(C), 1232(a)(5)(D).

As reflected by Plaintiffs' failure to cite any specific part of the challenged authorities as affecting unaccompanied alien children, *see* TRO Br. 24-25, Plaintiffs have no basis for objecting under the TVPRA. Plaintiffs imply that the fact that children who entered unlawfully will be subject to the asylum bar somehow violates the TVPRA. Yet Plaintiffs fail to cite any TVPRA provision guaranteeing substantive asylum outcomes for unaccompanied alien children. *See* TRO Br. 24-25. The TVPRA nowhere guarantees that unaccompanied children must be found eligible to receive asylum, only that they may apply for it as an initial matter in non-adversarial proceedings before USCIS. *See* 8 U.S.C. § 1158(b)(3)(C). Nothing in the rule or proclamation alters this. Unaccompanied children receive the process provided under the TVPRA. There is no conflict between the TVPRA and the rule.[6]

III. The Rule Is Reasonable and Properly Issued Under the APA.

The Rule represents a reasonable application of the Executive Branch's authority over admissions at the border and was properly issued pursuant to the APA's good-cause and foreign-affairs exceptions. Plaintiffs contend that the rule violates the APA because it is (1) arbitrary and capricious and (2) "it was improperly issued to be effective immediately without the opportunity for notice and comment." TRO Br. 25; *see also id.* at 25-36.

A. The Rule Is Not Arbitrary and Capricious.

The rule is not arbitrary and capricious. The Departments' decisions need provide only "a

[6] Plaintiffs' reliance on USCIS guidance is misplaced. That guidance does not alter the statutory and regulatory scheme outlined here, and merely repeats the Proclamation on this point.

rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), whether the Departments announce new policies or change prior policies, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). The Departments are not required to justify their policy change by reasons more substantial than those required to adopt a policy in the first instance. *See Fox Television*, 556 U.S. at 514-15, 19. No more than a "reasoned explanation for why [the agency] chose that interpretation" is required, *Lindeen v. SEC*, 825 F.3d 646, 656 (D.C. Cir. 2016), and Plaintiffs bear the heavy burden of demonstrating the interpretation challenged is not reasonable. *See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986). The Court is "not empowered to substitute its judgment for that of the agency," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and the Court's role "is limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record," *Arkansas Power & Light Co. v. I.C.C.*, 725 F.2d 716, 723 (D.C. Cir. 1984). Here, the Departments provided reasonable justification for the policy changes. The rule furthers a Presidential proclamation regarding entry, and reasonably addresses a growing crisis at the southern border whereby aliens cross the border in a dangerous and illegal manner and, if apprehended, claim asylum and remain in the country while the claim is adjudicated, with little prospect of actually being granted that discretionary relief.

1. The rule reasonably implements the President's proclamation and restores the statutory aim to efficiently remove aliens who lack meritorious asylum claims.

The rule works in conjunction with a Presidential proclamation and, in turn with that proclamation, restore control over the border and avoid the situation whereby aliens enter the country unlawfully from Mexico and, if apprehended, claim asylum and remain in the country while the claim is adjudicated, with little prospect of actually being granted that discretionary relief. Presidential "proclamations generally reflect sensitive determinations regarding foreign relations and national security that Congress recognized should be entrusted to the President." 83 Fed. Reg. at 55940 (citing *Hawaii*, 138 S. Ct. at 2411). As the rule explains, "Aliens who contravene such a measure have not merely violated the immigration laws, but have also undercut

the efficacy of a measure adopted by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States." *Id.* Even if "most of those aliens would already be inadmissible under our laws, the proclamation would impose limitations on entry for the period of the suspension against a particular class of aliens defined by the President. That judgment would reflect a determination that certain illegal entrants—namely, those crossing between the ports of entry on the southern border during the duration of the proclamation—were a source of particular concern to the national interest." *Id.* "The interim final rule [thus] reflects the Departments' judgment that, under the extraordinary circumstances presented here, aliens crossing the southern border in contravention of such a proclamation should not be eligible for a grant of asylum during the period of suspension or limitation on entry. The result would be to channel to ports of entry aliens who seek to enter the United States and assert an intention to apply for asylum or a fear of persecution, and to provide for consideration of those statements there." *Id.* The agencies thus provided a reason for their policy choice, and explained why implementing it in the way they chose furthered that goal. That explanation is reasonable, and that is all that is required. *See Fox Television*, 556 U.S. at 513 (under "'narrow'" standard of review," all agency must do is "examine the relevant data and articulate a satisfactory explanation for its action."); *see also Amanullah v. Nelson*, 811 F.2d 1, 17 (1st Cir. 1987) (regulation seeking "to deter aliens from attempting to enter the United States illegally" is "rationally related to the accomplishment of the Service's legitimate mission"); *Singh v. Nelson*, 623 F. Supp. 545, 556 (S.D.N.Y. 1985) ("the Service is attempting to discourage people from entering the United States without permission and serves notice that aliens will not be able to circumvent the procedures governing lawful immigration to this country. This goal provides a rational basis for distinguishing among categories of illegal aliens."); *Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1377–78, 1381 (S.D. Fla. 2002) (similar).

The rule also reinforces the statutory aim of expedited removal, which is to "'make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States.'" 83 Fed. Red. at 55941 (quoting H.R. Rep. No. 104–469, pt. 1, at 157 (1996)); *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998), *aff'd*, 199 F.3d 1352

(D.C. Cir. 2000) (describing the expedited removal process as a "summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation"). Indeed, in creating the expedited removal system through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009-546, Congress was expressly "concerned with rampant delays in proceedings to remove illegal aliens, created expedited procedures for removing inadmissible aliens, and authorized the extension of such procedures to aliens who entered illegally and were apprehended within two years of their entry." 83 Fed. Reg. at 55935 (citing 8 U.S.C. § 1225(b)). Those procedures were aimed at facilitating the swift removal of inadmissible aliens, including those who had entered illegally, while also expeditiously resolving any asylum claims. *Id.* at 55941. The credible-fear standard "'[wa]s designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process.'" 83 Fed. Reg. at 55941 (quoting H.R. Rep. No. 104–69, at 158).

But, in practice, the congressional aim has been frustrated. 83 Fed. Reg. at 55944. As the Departments explain, currently an inadmissible alien "may avoid being removed on an expedited basis by making a threshold showing of a credible fear of persecution at a[n] initial screening interview." *Id.* at 55941. Often, these inadmissible aliens are "released into the interior of the United States pending adjudication of such claims by an immigration court in section 240 proceedings"—that is, proceedings under 8 U.S.C. § 1229a—especially if those aliens travel as family units." *Id.* at 55941. Further, adjudication of an asylum application in immigration court "can take months or years" due to the increasing court backlog. *Id.* at 55941, 55945.

Two critical facts identified by the rule underscore the urgent need for the rule. First, the implementation of the credible fear standard creates a large "disconnect between the number of aliens asserting a credible fear and the number of aliens who ultimately are deemed eligible for, and granted, asylum," 83 Fed. Reg. at 55944—in FY2018, the percentage of positive credible fear determinations was about 89%. *Id.* at 55945. In other words, nearly all of the aliens in expedited removal who were referred to a credible fear interview passed their screen and were referred to immigration court for full removal proceedings. *Id.* at 55945. Yet nearly half of aliens who

received a positive credible fear determination never filed an application for asylum or were ordered removed in absentia. *Id.* at 55946. And "less than about 6,000 aliens who passed through credible-fear screening (17% of all completed cases, 27% of all completed cases in which an asylum application was filed, and about 36% of cases where the asylum claim was adjudicated on the merits) established that they should be granted asylum." *Id.* at 55946.[7]

Second, the number of aliens asserting credible fear has skyrocketed—increasing by 2000% from FY2008 to FY2018. 83 Fed. Reg. at 55945. This has had a dramatic impact on the immigration court backlog, where "[a]s of November 2, 2018, there were approximately 203,569 total cases pending in the immigration courts that originated with a credible-fear referral—or 26% of the total backlog of 791,821 removal cases." *Id.*

The rule thus restores Congress's aim to expeditiously remove inadmissible persons who do not have meritorious asylum claims. 83 Fed. Reg. at 55941, 55944-45; *see Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1039 (D.C. Cir. 2012). This reasonably ensures that inadmissible aliens ineligible for asylum are not placed into full removal proceedings unnecessarily and contrary to Congress' intent that such aliens be expeditiously removed from the United States. *See Int'l Internship Programs v. Napolitano*, 853 F. Supp. 2d 86, 99 (D.D.C. 2012), *aff'd*, 718 F.3d 986 (D.C. Cir. 2013) (finding DHS's "interpretation is particularly reasonable in light of the statute's legislative history"). The rule would "help ameliorate the pressures on the present system" by permitting the prompt determination of whether the alien is subject to the proclamation eligibility bar without requiring full removal proceedings and thereby "reduce the number of cases referred to section 240 proceedings," where aliens often do not appear, apply for, or receive asylum. 83 Fed. Reg. 55944-47. Further, full removal proceedings are unnecessary when this eligibility bar applies because determining "whether an alien is subject to a suspension of entry proclamation would ordinarily be straightforward." *Id*. Given that simplicity, referring such aliens to full removal proceedings is not necessary. *Id*. Indeed, the Departments stated that

[7] Statistics from the Northern Triangle countries in particular underscore this point. Of the 20,784 total aliens from these countries who made it past the credible-fear screening stage in FY2018, only 536 Hondurans, 408 Guatemalans, and 945 Salvadorans who initially were referred for a credible-fear interview (whether in FY 2018 or earlier) and progressed to section 240 proceedings were granted asylum. 83 Fed. Reg. at 55934-01.

for those "aliens [who] continue[] to enter the United States in violation of a relevant proclamation, the application of the rule's bar to eligibility for asylum in the credible-fear screening process . . . would reduce the number of cases referred to section 240 proceedings." *Id.* at 55947. These explanations more than suffice for arbitrary-and-capricious review. *See Fox Television*, 556 U.S. at 513-14.

Reduction in the number of cases referred to section 240 proceedings relieves administrative burdens in a number of ways. The shift to front-end asylum screening rather than full-on *de novo* adjudication in full removal proceedings would undoubtedly decrease overall administrative burdens. 83 Fed. Reg. at 55947-48 (explaining how resources could be reallocated to screening procedures rather than used in section 240 proceedings). DOJ and ICE attorney resources can be reallocated to other immigration proceedings and DHS would spend less time processing employment authorization and travel documents for aliens awaiting adjudication of an asylum application. *Id.* at 55948. Further, increased costs for DHS related to enforcement and removal "would be counterbalanced by the fact that it would be considerably more costly and resource-intensive to ultimately remove such an alien after the end of section 240 proceedings and the desirability of promoting greater enforcement of the immigration laws." *Id.* at 55948; *see Judulang v. Holder*, 565 U.S. 42, 63–64 (2011) ("Cost is an important factor for agencies to consider in many contexts . . . . In rejecting [the agency's] rule, we do not preclude the [BIA] from trying to devise another, equally economical policy respecting eligibility for § 212(c) relief, so long as it comports with" the law); *Reno v. Flores*, 507 U.S. 292, 311-12 (1993); *Capital Area Immigrant's Rights Coal. v. U.S. Dep't of Justice*, 264 F. Supp. 2d 14, 38 (D.D.C. 2003). And finally, persons properly placed in full removal proceedings could have their cases adjudicated more swiftly if the number of non-meritorious cases declined. 83 Fed. Reg. at 55948.

Plaintiffs quibble with the Departments' conclusions and findings underpinning the Rule. *See* TRO Br. 26–30. These predictions against the rule's promoting better efficiency, however, constitute mere speculation and fail to apply the proper deference to agency findings. For example, Plaintiffs claim that the rule would not be more efficient because "asylum officers will have to consider a new sort of issue in screening." *Id.* at 27 (citations omitted). This argument fails to

account for efficiencies created through uniformity promoted by screening an alien's eligibility for withholding of removal and CAT protection under the reasonable-fear standard, which is already employed for aliens who are barred from asylum eligibility by other parts of the INA. 83 Fed. Reg. at 55942. Moreover, by applying the reasonable-fear standard for protection claims, the screening process for aliens in expedited removal will become more accurate. *Id.* at 55947. Plaintiffs also claim that the Departments present no evidence for the propositions that the rule "could affect the decision calculus" to enter unlawfully across the Southern Border and that "fewer proceedings under Section 240" would occur. TRO Br. 28. This argument flips the burden—which is on *Plaintiffs*, who must show the "interpretation challenged is not reasonable." *San Luis Obispo*, 789 F.2d at 37. Moreover, the Departments' conclusions are logically tailored to achieve their goals as authorized by statute, and provide far more than the "reasoned explanation for why [the agency] chose that interpretation." *Lindeen*, 825 F.3d at 656.

2. The rule reasonably conditions eligibility for asylum on an individual's compliance with a Presidential proclamation.

The Ninth Circuit stay panel offered its own preliminary view as to why the rule is arbitrary and capricious: "it conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself." *East Bay Sanctuary Covenant,* 2018 WL 6428204, at *16. The stay panel was wrong to make that conclusion.

The statute does not require that a condition or limitation on asylum ineligibility directly relate to the substantive asylum standard. Section 1158(b)(2)(C) requires only that "additional limitations and conditions" be "consistent with this section." Indeed, § 1158 contains several ineligibility bars that have "nothing to do" with whether the alien faces the requisite persecution to satisfy the refugee standard. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(ii) (rendering ineligible any alien "convicted by a final judgment of a particularly serious crime" who "constitutes a danger to the community of the United States"). In any event, the rule, like the other categorical bars, is related to asylum: It governs which categories of aliens are eligible for a *discretionary* benefit and makes clear that individuals who violate certain U.S. laws are not eligible for such discretionary relief.

In imposing this "directly related" requirement, the Ninth Circuit relied on a treaty provision barring the imposition of "penalties [on refugees] on account of their illegal entry or presence." *East Bay*, 2018 WL 6428204, at *16 (quoting Convention, art. XXXI, §1, 189 U.N.T.S. at 174). The panel majority also suggested that the classification is arbitrary because "whether an alien enters the United States over its land border with Mexico rather than through a designated port of entry is uncorrelated with the question of whether [the applicant] has been persecuted in, say, El Salvador." *Id.* This misses the mark as well. The rule is not a "penalty" but is instead an additional condition for asylum eligibility within the Attorney General's statutory discretion in order to promote a safer and more efficient system for processing asylum claims, as well as considering national security interests. *See supra.*

B. The Rule Satisfies the APA's Procedural Requirements.

The rule satisfies APA procedural requirements because it falls within two exceptions to notice-and-comment rulemaking. The APA provides exceptions to its general notice-and-comment and effect-date requirements when either "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(B), (d)(3), or the rule "involve[s] . . . [a] foreign affairs function of the United States," *id.* § 553(a)(1). The rule here fits within both exceptions.

First, Defendants properly invoked the foreign-affairs exception, which exempts from notice-and-comment rulemaking agency actions "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exporters v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985). As the Departments explained, "[t]he flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy interests of the United States." 83 Fed. Reg. at 55950. The rule and proclamation directly relate to "ongoing negotiations with Mexico about how to manage our shared border," and how to consider asylum claims from nationals of Northern Triangle countries, and with the Northern Triangle countries to control the flow of their nationals. *Id*. Importantly, "the United States and Mexico have been engaged in ongoing discussions of a safe-third-country agreement"—whereby aliens normally must seek asylum in the first country they enter, rather than

transiting one country to seek asylum in another. *Id*. By discouraging illegal entry during this crisis and requiring orderly processing, the rule and proclamation will help "develop a process to provide this influx with the opportunity to seek protection at the safest and earliest point of transit possible" and "establish compliance and enforcement mechanisms for those who seek to enter the United States illegally, including for those who do not avail themselves of earlier offers of protection." *Id*. These interlocking goals are all "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exporters*, 751 F.2d at 1249.

Plaintiffs' response boils down to an argument that the foreign-affairs exception has narrow application. TRO Br. 33-36. This argument is unavailing. First, Plaintiffs ignore that this same foreign-affairs rationale has repeatedly justified rules, like this one, that address the movement of individuals between nations. *See, e.g.*, 81 Fed. Reg. 14948, 14952 (Mar. 21, 2016) (invoking foreign-affairs exception in rule addressing flights to Cuba); 82 Fed. Reg. at 4904-05 (the exception applies "to travel and migration between the two countries"); *see also Raoof v. Sullivan*, 315 F. Supp. 3d 34, 43-44 (D.D.C. 2018) (rule imposing two-year foreign residence requirement prior to visa issuance "certainly relates to the foreign affairs and diplomatic duties" of the Executive Branch). Here, the rule and proclamation "necessarily implicate our relations with Mexico and the President's foreign policy, including sensitive and ongoing negotiations with Mexico about how to manage our shared border." 83 Fed. Reg. at 55950. Second, it improperly asks the Court to second-guess the Executive's predictions about future actions and risks, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010), especially on foreign affairs, *see Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). Here, notice-and-comment rulemaking would slow and limit the ability to negotiate with Mexico and Northern Triangle governments, and a "prompt response" is needed to address the crisis at our southern border. *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980).

In *East Bay* the Ninth Circuit panel majority suggested that, although it found "some merit" to that "theory," the "connection between negotiations with Mexico and the immediate implementation" of the rule was not sufficiently apparent from the record. 2018 WL 6428204, at

*20. But the panel majority was in no position to second-guess the Executive Branch's determination that the rule would facilitate negotiations and support the President's foreign policy. *See id.*, Dissent at 1 ("the Rule involves actions of aliens at the southern border undermining particularized determinations of the President judged as required by the national interest, relations with Mexico, and the President's foreign policy"). The implications for potential negotiations are obvious and, in any event, the government cannot reasonably be expected to telegraph its negotiating strategy in a public document. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999) (declining to require "the disclosure of foreign-policy objectives" for particular removal decisions).

Second, Defendants properly invoked the good-cause exception. The good-cause exception applies when "the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare." *Mobil Oil Corp. v. DOE*, 728 F.2d 1477, 1492 (TECA 1983). Significant "threat[s] to public safety" provide good cause to make rules without pre-promulgation notice and comment. *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995). The Departments recognized that pre-promulgation notice and comment or a delayed effective date "would result in serious damage to important interests" by encouraging a surge of aliens to enter between ports of entry before the rule took effect and that such crossings risk the safety of aliens and Border Patrol agents. 83 Fed. Reg. at 55949-50.

Plaintiffs counter that appropriate invocations of the good-cause exception are rare and must involve some emergent danger or threat to public safety. TRO Br. 31-33. This argument ignores the reality Defendants explained. Hundreds die each year making the dangerous border crossing.[8] *See* 83 Fed. Reg. at 55950. 55950 These crossings—which require at-large apprehensions—also "endanger[] . . . [federal] agents who seek to apprehend" these aliens. *Id.* at 55935. The Departments therefore concluded that immediate implementation is warranted

[8] U.S. Border Patrol Fiscal Year Southwest Border Sector Deaths (FY 1998 - FY 2017), https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Deaths%20FY1998%20-%20FY2017.pdf (294 deaths in FY2017); *see also* https://missingmigrants.iom.int/region/americas?region=1422 (368 deaths thus far in 2018).

because it will prevent a "rush" at the border before the rule goes into effect, steer the large groups of aliens en route to ports of entry, and avoid an *increase* in the already high number of aliens making the dangerous border crossing to beat the effective date of the rule. *Id.* at 55950. Thus, this is a situation where "delay could result in serious harm." *Jifry v. F.A.A.*, 370 F.3d 1174, 1179-80 (D.C. Cir. 2004). Indeed, *Jifry* relies on *Hawaii Helicopter*, which found good cause based on a much lower level of safety risk than that presented here. *Id.* It is also consistent with prior regulatory changes to entry policies. As with prior border-policy changes, there is good cause to prevent "foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations.'" *Id.* at 55950 (quoting 69 Fed. Reg. at 48878); *see id.* (citing prior uses of good-cause exception to address border-entry rules).

The Ninth Circuit's decision *East Bay* is also not persuasive. Although stating that "an announcement of a proposed rule" can "create[] an incentive for those affected to act prior to a final administrative determination," the panel majority nevertheless concluded that the good-cause exception likely did not apply because the potential "surge" in dangerous border crossings would be triggered only by the rule "combined with a presidential proclamation." 2018 WL 6428204, at *20. But the rule was published on the same day as, and in anticipation of, the proclamation, in close concert with action by the President—as the panel majority otherwise recognized in evaluating their combined effect. *See* 2018 WL 6428204, at *1 (reviewing legality of "effect of the Rule together with the Proclamation"). And the Attorney General and the Secretary could have reasonably anticipated a surge in illegal crossings even absent an impending proclamation, as aliens would have had the same incentive to rush to enter before the rule could take effect and be triggered at any time by a proclamation. Regardless, "[t]he Attorney General articulated a need to act immediately in the interests of safety of both law enforcement and aliens," *id.*, Dissent at 1, and that satisfies the good cause requirement. *See Jifry*, 370 F.3d at 1179.

IV. The Other Stay Factors Foreclose Issuing a TRO or Injunction

A. Plaintiffs Cannot Demonstrate Irreparable Harm

Although Plaintiffs fail to demonstrate any of the four factors warranting an injunction,

their failure to demonstrate irreparable harm is particularly compelling and the Court need go no further than this threshold failing in denying the motion.

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). The "failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). As this Court has recognized, "[t]he D.C. Circuit has set a high standard for irreparable injury. The injury must be unrecoverable; it must be both certain and great; [and] it must be actual and not theoretical." *Cal. Ass'n of Private Postsecondary Sch. v. DeVos*, No 17-cv-999, 2018 WL 5017749, at *6 (D.D.C. Oct. 16, 2018). Plaintiffs fail this standard.

To start, Plaintiffs have not met their burden of showing irreparable harm when what they seek to enjoin is already enjoined nationwide by another court. *See Pars Equality Ctr. v. Trump*, Case No. 1:17-cv-00255-TSC, ECF 84 (D.D.C. May 11, 2017). And even in cases where Plaintiffs filed a motion for a preliminary injunction *before* a nationwide injunction was issued—which was not the case here—courts stayed those requests after a nationwide injunction was issued. *See Hawaii v. Trump*, 2017 WL 536826 (D. Haw. Feb. 9, 2017); *Washington v. Trump*, 2017 WL 1050354 (W.D. Wash. Mar. 17, 2017); *Ali v. Trump*, 2017 WL 1057645 (W.D. Wash. Mar. 17, 2017); *Al-Mowafak v. Trump*, No. 3:17-cv-00557-WHO (N.D. Cal. Apr. 18, 2017), ECF No. 63. That is because the requirement that a party show irreparable harm restricts a court's authority to issue a duplicative nationwide injunction.

Similarly, here, Plaintiffs cannot meet the demanding standard for showing irreparable harm. First, as described above, neither individual Plaintiff is currently subject to the rule and, at most, *could* be subject to it if it were not enjoined at some indeterminate point in the future. But the rule is currently already enjoined nationwide. *See East Bay Sanctuary Covenant v. Trump*, Case No. 3:18-cv-6810, ECF 43 (N.D. Cal. Nov. 19, 2018). The Northern District of California has, in effect, provided Plaintiffs with the full relief that they seek from this Court. Although Plaintiffs argue that the existence of the California injunction blocking enforcement of the rule

"does not negate the need for injunctive relief, particularly given that the Government has filed emergency applications to stay or vacate that injunction," TRO Br. 2 n.1, the Ninth Circuit has denied the government's stay motion and concluded that the district court did not err in enjoining enforcement of the rule universally. *See East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 6428204 (9th Cir. Dec. 7, 2018). The injunction remains in effect at this time. Plaintiffs cannot prove any imminent irreparable harm justifying an additional injunction from this Court. *See Winter*, 555 U.S. at 22 (must make "clear showing that the plaintiff is entitled to such relief."); *Pars Equality*, ECF No. 84 (recognizing that a nationwide injunction casts doubt on the imminence of any alleged harms). Thus, Plaintiffs "have not demonstrated that they will suffer great, concrete, corroborated and certain irreparable harm absent the injunctive relief" they seek here.[9] *Jones*, 177 F. Supp. 3d at 548.

And even if the injunction in the Northern District of California did not exist, the individual Plaintiffs' assertion that they *might* be removed, TRO Br. 2, 37, rings hollow because there is still no concrete or imminent possibility that that will happen. First, withholding of removal and CAT protection are the only mandatory protections to which they are entitled: there is no right to asylum or to enter the country, and receiving a discretionary benefit after engaging in dangerous illegal activity cannot form the basis for irreparable harm. *See East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 6428204, at *10 (9th Cir. Dec. 7, 2018) ("The Organizations' clients, of course, would not have standing to assert a right to cross the border illegally, to seek asylum or otherwise."). Moreover, Plaintiffs have been served notices to appear before the immigration court for full removal proceedings, *see* Ex. A, that will take months if not years, and if relief sought is denied, they may seek relief in the appropriate court of appeals if they do not prevail before the immigration court and the Board of Immigration Appeals. *See* 8 U.S.C. § 1252(a). For similar reasons, the individual Plaintiffs' assertion that the rule and proclamation deny them "their right to seek asylum under the statutory standards, which itself constitutes irreparable harm," TRO Br. 37, is mistaken. Both individual Plaintiffs received positive credible-fear findings from USCIS

[9] Indeed, Plaintiffs' allegations of irreparable harm ignore the injunction and speak of the rule as if it has been applied to them. *See* TRO Br. 37.

under the pre-existing standard and they may apply for asylum in their full removal proceedings. Plaintiffs are thus wrong to claim that they are irreparably harmed by the rule, which has not been applied to them, much less to deny them anything.

As for the organizational Plaintiffs, the alleged "deprivation of [an] opportunity" to "file[] comments objecting to the Rule," TRO Br. 41, is not sufficient to demonstrate irreparable harm. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (stating that there could be no presumption of irreparable harm based on violation of a statutory procedural requirement). A putative procedural violation generally does not produce irreparable injury because the violation has already occurred and can "be remedied by a decision on the merits" (such as by requiring the agency to re-do the decision using the proper procedures). *See Elk Associates Funding Corp. v. U.S. Small Bus. Admin.*, 858 F. Supp. 2d 1, 31 (D.D.C. 2012). Thus, "irreparable injury cannot stand on procedural violation alone without showing another actual injury not compensable in money damages." *Am. Ass'n for Homecare v. Leavitt*, No. 08-cv-0992, 2008 WL 2580217, at *5 (D.D.C. June 30, 2008) (collecting cases).

The organizational Plaintiffs also claim that the rule "would interfere with [their] mission" of "[f]acilitating asylum applications for those who enter along the border with Mexico" and require them to "divert time and resources from the provision of other services." TRO Br. 39-40. But even if this injury may be sufficient to demonstrate *standing*—which it is not, *see supra*—they fail to demonstrate immediate and irremediable harm for purposes of an injunction. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (injuries "in terms of money, time and energy" insufficient). Plaintiffs merely speculate that the rule "would require them to staff credible fear interviews with attorneys" rather than previously relied upon legal assistants, paralegals and law students. TRO Br. 40 ("anticipat[ing]" such effects).[10] Moreover, even asylum-ineligible aliens may still apply

[10] The cases Plaintiffs rely on are inapt. TRO Br. 39, 41. *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016), and *Open Comms. Alliance v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017), require an actual *showing* that the agencies programs have been "perceptibly impaired." *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 739 (S.D. Ind. 2016), did not address irreparable harm tied to funding at all, but rather addressed whether *constitutional* violations may support irreparable harm. And *Doe v. Trump*, 288 F. Supp. 3d 1045, 1082 (W.D. Wash. 2017), involved actual evidence, rather than speculation, that the organizations would "need

for withholding and CAT protection, and do so through the asylum application process, so it is speculative that this state of affairs will somehow cause Plaintiff CAIR imminent and irremediable losses to its funding, *cf.* TRO Br. 41 ("it *may* also jeopardize the organization's financial viability, because *some* of its funding is tied to the number of detained adults that CAIR Coalition represents at trial each year" (emphasis added)). *See* 83 Fed. Reg. at 55946 ("current backlog of asylum cases exceeds 200,000" and more than 200,000 inadmissible aliens present themselves for inspection at ports of entry annually (even without the additional incentive to do so that the rule would create)). Given the large universe of potential clients, any adverse effect on Plaintiffs' resources or mission is merely conjuncture at this point. Similarly, Plaintiffs' conclusory assertion that the rule would affect their organizations' ability to represent clients "throughout their entire immigration cases, creating a risk of irreparable reputational harm," TRO Br. 41, is speculative by its own terms.

Nor can Plaintiffs manufacture injury by spending additional resources in response to the rule. Plaintiffs have no "legally protected interest," *Gill*, 138 S. Ct. at 1929, in not devoting their own resources to advocating for their clients. *See, e.g.*, *National Taxpayers Union,* 68 F.3d at 1434 ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."). And so they cannot demonstrate irreparable harm based on the same alleged injury. *Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). And even if Plaintiffs had a legally protected interest in not reallocating their resources, any injury to that interest would not be caused by the rule but rather by Plaintiffs' own choices in response to the rule; such "self-inflicted injuries" would not be fairly traceable to the rule. *See Clapper*, 568 U.S. at 416.

B. The Balance of Harms Weighs Against a Preliminary Injunction

The final two factors required for preliminary injunctive relief—harm to the opposing party and the public interest—merge when the government is the party opposing an injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, Plaintiffs make no showing that their alleged "irreparable

to lay-off employees, reduce services, cancel established programs, lose institutional knowledge, and ultimately lose goodwill with volunteers and community partner." None of these cases suggest that bare speculation, absent an actual *showing* of harm, is sufficient.

injury" outweighs the threatened harm that an injunction would cause Defendants, or that it would not "adversely affect [the] public interest." *Id.* Indeed, Plaintiffs fail to come to grips with the urgent need for the rule: the "significant increase in the number and percentage of aliens who seek admission or unlawfully enter . . . and then assert an intent to apply for asylum," 83 Fed. Reg. at 55944-45, who then "raise[] non-meritorious asylum claims, and secur[e] release into the country." *Id.* at 55935, 55946.

Any order that enjoins a governmental entity from enforcing actions taken pursuant to statutes enacted by the duly elected representatives of the people constitutes an irreparable injury that weighs heavily against the entry of injunctive relief. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). It is always in the public interest to protect the country's borders and enforce its immigration laws. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982). And foreign-policy determinations are left to the political branches. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). The Executive Branch—tasked with foreign relations—decided to "encourage . . . aliens to first avail themselves of offers of asylum from Mexico" and is engaging in international negotiations accordingly. 83 Fed. Reg. at 55950. Indeed, the rule seeks to prevent "needless deaths and crimes associated with human trafficking and alien smuggling operations" (*id.*) and ensures that aliens in the United States who are ineligible for asylum will not be returned to countries where they face a clear possibility of persecution or torture. Any injunction would undermine the separation of powers by blocking the Executive Branch's lawful use of its authority to serve these goals. *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) (reversing "injunctive relief [that] deeply intrudes into the core concerns of the executive branch"). Because Plaintiffs suffer no harm absent an injunction and an injunction would cause harm to the government, the balance of harms weighs against a preliminary injunction.

V. Any Interim Relief, if Granted at All, Must Be Sharply Limited

A. The Court May Not Issue Any Injunctive Relief Under Section 1252(e)(3)

The D.C. Circuit has made clear that § 1252(e)(3) contemplates lawsuits "by, and only by, aliens against whom the new procedures ha[ve] been applied." *AILA*, 199 F.3d at 1359. Section 1252(e) also bars class-action challenges in such suits. *See* 8 U.S.C. § 1252(e)(1). None of the

Plaintiffs are presently subject to a "determination[] under section 1225(b)." Ex. A. Further, this Court reviews—and can issue relief that extends only so far as—the expedited removal determinations of the individuals before the court. *AILA*, 199 F.3d at 1359. It is in the context of those "determinations under section 1225(b) and its implementation" that this Court "determin[es] . . . whether . . . a regulation, or a written policy . . . issued . . . to implement such section . . . is . . . in violation of law." 8 U.S.C. § 1252(e)(3)(A)(ii). Thus, if the Court finds that a regulation or policy violates the law, the appropriate relief is to vacate the expedited removal determination that was issued based on that erroneous policy. That is especially so given that the statute explicitly precludes the injunctive relief Plaintiffs request. *See id.* § 1252(e)(1). Regardless, no Plaintiff is in expedited removal, so it would be especially inappropriate to issue any relief under § 1252(e)(3)

B. The Court Cannot Enjoin Operation of the Rule under the APA

Assuming the INA did not foreclose jurisdiction or authority to enter any injunctive relief, and provide a remedy through administrative proceeding for the two individual Plaintiffs presently issued notices to appear for full removal proceedings, the sole available remedy would be a stay of the application of the rule to them—and only them—while the case continues on the merits. If this Court were to ultimately hold that the government needs to engage in notice-and-comment rulemaking, the remedy—*after* a determination on the merits—would be to remand the case to the agencies for that rulemaking. *See, e.g.*, *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 623 (D.C. Cir. 1980) (enjoining a rule until notice and comment has been completed). At this intermediate stage, the APA itself provides that the Court may "to the extent necessary to prevent irreparable injury," only "preserve [the] status or rights [of plaintiffs] pending conclusion of the review proceedings." 5 U.S.C. § 705. That provision does not "confer authority to grant relief" beyond the narrow confines of permitting *appellate* courts "to issue appropriate writs in aid of [their] jurisdiction." *Sampson v. Murray*, 415 U.S. 61, 69, 73, & n.15 (1974); *cf. National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C.Cir.1998) (allowing *permanent* injunction on facts of that case after decision on the merits). In allowing preliminary injunctions only "to the extent necessary to prevent irreparable injury," the APA thus codifies the

principle that preliminary injunctions are not designed to "enjoin all possible breaches of the law," but rather to "remedy the specific harms" allegedly suffered by plaintiffs themselves. *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). Indeed, a TRO "should be restricted to" "preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing and no longer," *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974), and relief must be "as narrow as possible to prevent the irreparable injury" of Plaintiffs—and only Plaintiffs. *Cal. Hosp. v. Maxwell-Jolly*, 2011 WL 464008 *1 (E.D. Cal. Feb. 4, 2011).

C. The Court May Not Issue a Nationwide Injunction

Finally, even if the Court were to issue some sort of temporary relief, the Court lacks authority to enjoin the rule's application nationwide, as Plaintiffs request. Proposed Order, ECF No. 6-7. The organizational Plaintiffs may not assert the rights of third parties not before the Court and have no legally protected interest in insisting those aliens be allowed to enter the country unlawfully to support their businesses. *East Bay*, 2018 WL 6428204, at *10; *Walker*, 450 F.3d at 1093. Article III and equitable principles require that relief be no broader than necessary to redress the Plaintiffs' injuries. Under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), especially at this stage, where the purpose of any TRO or injunction is to "preserve the relative positions of the parties until a trial," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). And the rule in equity is that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Indeed, nationwide injunctions "did not emerge until a century and a half after the founding," and they "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring). And such injunctions mean a plaintiff need only win once to stop a national law or policy—but the government needs to win every case. *Cf. United States v. Mendoza*, 464 U.S. 154, 158-64 (1984).

CONCLUSION

The Court should deny the motion for a TRO or preliminary injunction.

Respectfully submitted,

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Dated: December 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Joseph Darrow*
JOSEPH DARROW

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.M.S.R., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF ELIZABETH M. SCOTT

I, Elizabeth M. Scott, pursuant to 28 U.S.C. § 1746, and based upon my information made known to me in the course of my employment, hereby declare as follows:

(1) I am an Asylum Officer in the U.S. Citizenship and Immigration Services (USCIS) Asylum Division. I have held this position since January 2010. In this role I manage the credible fear program for the Operations Branch and I am familiar with the implementation of the interim final rule.

(2) I have reviewed the USCIS information regarding the Plaintiffs in this case, S.M.S.R. and R.S.P.S. The information in this declaration is based upon that information and belief.

(3) My review reflects that S.M.S.R. and R.S.P.S. were referred to USCIS for a credible fear interview on November 15, 2018. S.M.S.R. indicated that R.S.P.S. was her child and was to be included as a dependent to her credible fear determination. An Asylum Officer in the USCIS Asylum Division conducted a credible fear interview of S.M.S.R., on behalf of herself and R.S.P.S., on November 19, 2018.

(4) USCIS initially interviewed S.M.S.R. and R.S.P.S. under the reasonable fear standard after they were unable to establish a credible fear given the applicability of the interim final rule (IFR), "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, Procedures for Protection Claims," which was in effect at the date and time of interview, but enjoined by the Court in *East Bay Sanctuary Covenant v. Trump* that same day.

(5) On or about November 21, 2018, after the interview was conducted, but before a decision was reached, the USCIS asylum officer, with concurrence of a supervisory asylum officer,

determined that S.M.S.R. was positive for credible fear. USCIS made its positive credible fear determination by applying the pre-IFR significant possibility standard to the facts presented by S.M.S.R. As R.S.P.S. was included as a dependent to S.M.S.R's positive credible fear determination on November 21, 2018, USCIS issued Notices to Appear to S.M.S.R. and R.S.P.S. consistent with that positive credible fear determination.

(6) The Notices to Appear informed S.M.S.R. and R.S.P.S. that they are to be placed in removal proceedings under 8 U.S.C. § 1229a. Therefore, they will not be subject to additional credible fear or expedited removal procedures based on this entry, as they will be subject to removal proceedings under 8 U.S.C. 1229a.

Executed this **12th** day of **December, 2018**.

ELIZABETH M. SCOTT
Asylum Officer, Asylum Division
U.S. Citizenship and Immigration Services

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.M.S.R., *et al.*, Plaintiffs, v. Donald J. Trump, President of the United States, *et al.*, Defendants.	Civil Action No. 1:18-cv-2838 PROPOSED ORDER

ORDER

Having considered Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ECF No. 6, and Defendants' response thereto, and all related filings and submissions, the Court hereby DENIES Plaintiffs' Motion and declines to issue a temporary restraining order or preliminary injunction.

DATED: _____

_____
HON. RANDOLPH D. MOSS
U.S. DISTRICT JUDGE